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CLEARINGHOUSE RULE 99−031

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

a. Section 101.144 (3m) (a) 3., Stats., requires the departments to set "schedules" for determining whether a petroleum product discharge site should be classified as high, medium or low priority. Nothing in the rule appears to set a schedule.

b. Section Comm 46.05 (1) [corrected numbering] requires the development of a procedure to allow the closure of sites with contaminants at or above the enforcement standard on-site, and below the enforcement standard off-site. The groundwater law does not make a similar distinction between on-site and off-site contamination. Contamination is measured at a "point of standards application" under ss. 160.23 and 160.25, Stats., to determine the need for a regulatory response. These statutes require a much more complex analysis than is provided in the rule, and the simplistic procedure in the rule may not comply with the groundwater statutes.

c. Section 160.23 (1), Stats., sets forth certain regulatory responses that apply when the concentration of a substance in groundwater attains or exceeds a preventive action limit, but does not exceed an enforcement standard. Section Comm 46.06 (1) (a) requires that sites where contamination is below the enforcement standard must be closed without requiring additional remedial efforts. The rule does not appear to be consistent with the statutory requirement.

The decision-making process called for in s. Comm 46.06 (1) (b) and (c) must take into account the requirements of ss. 160.23 and 160.25, Stats. The rule does not expressly state the connection with the statutory requirements.

d. Section Comm 46.06 (3) requires the recognition of errors in measurement, repeatability of test results and statistical significance in determining the level of contamination. This provision further requires the Department of Natural Resources (DNR) and the Department of Commerce to develop a process for taking these issues into account. However, s. 160.19 (6), Stats., requires DNR to "promulgate by rule a scientifically valid procedure for determining if a preventive action limit or enforcement standard is, in fact, attained or exceeded." The DNR has done so in s. NR 140.14, Wis. Adm. Code. The statute further requires that the procedure developed by DNR be used for "all regulatory and enforcement purposes under [ch. 160, Stats.]." How is it intended that this new procedure will relate to the existing statutory and rule requirements, and what is the authority for Commerce's involvement in this process?

2. Form, Style and Placement in Administrative Code

a. "And/or" should not be used in s. Comm 46.06 (3) or at several other places in the rule.

b. The parenthetical "s" to indicate singular or plural, as used in s. Comm 46.02 (8) and several other places in the rule, is not proper form.

4. Adequacy of References to Related Statutes, Rules and Forms

a. The reference to "this section" in s. Comm 46.01 (2) is copied from the statute. The reference should be changed to s. 101.144, Stats., if this purpose is to be restated in the rule. Also, to be consistent with the statute, the rule should reference s. 292.11 (7), Stats.

b. The proper abbreviation of "statutes" should be used in s. Comm 46.02 (4).

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The purpose described in s. Comm 46.01 (1) should be more specific. For example, the rule could state that the purpose is to determine the functions of the two departments "in the administration of [the appropriate statutory cross-reference]."

b. The definition of "enforcement standard" in s. Comm 46.02 (4) conforms with the definition of that term in s. 160.01 (2), Stats. This definition uses the word "substance." There is no reason why the word "compound" should be substituted for that term in s. Comm 46.02 (5) (c).

c. Section Comm 46.02 (5) (intro.) defines a high priority site as a type of "remediation site." However, s. 101.144 (3m) (a) 3., Stats., refers to the "site of a discharge of a petroleum product from a petroleum storage tank." It is not clear why a different term is used in the rule. As defined in the rule, a site cannot be classified as a high, medium or low priority site if it is not yet a remediation site. [See, also, s. Comm 46.02 (6) (intro.) and (7) (intro.).]

d. "Established" as used in s. Comm 46.02 (5) (c) is superfluous. If an enforcement standard is not "established," then it is not an enforcement standard.

e. Section 101.143, Stats., uniformly uses the term "petroleum product." It is not clear why s. Comm 46.02 (5) (a) and (6) (a) refers only to "petroleum" contamination.

f. The statute refers to the site of a discharge of a petroleum product "from a petroleum product storage system." It is not clear why the phrase "petroleum product storage tank system" is used in s. Comm 46.02 (5) (a), "petroleum storage tank system" is used in s. Comm 46.02 (7) (a), and the phrase is omitted entirely from s. Comm 46.02 (6) (a).

g. The definitions of "high priority site" in s. Comm 46.02 (5) (a) and "medium priority site" in s. Comm 46.02 (7) (a) do not specifically require that the site be contaminated by a petroleum product. Petroleum product contamination appears to be assumed; it should be expressed.

h. Section Comm 46.02 (5) (b) refers to a discharge that "would pose a greater than normal threat." This provision does not indicate the nature of this threat (i.e., what is the subject of the threat?). What is an area of "exceptional environmental value"?

i. The definition of "low priority site" in s. Comm 46.02 (6) (a) states that there must be "no threat" to groundwater. What level of contamination is deemed to pose no threat to groundwater?

j. The definition of "medium priority site" in s. Comm 46.02 (7) (b) requires that there be no confirmed groundwater contamination at or above the enforcement standard. However, this requirement is not restricted to contamination resulting from a petroleum product from a petroleum product storage tank. Is that the intent?

k. Section Comm 46.02 (8) should be rewritten in a less bureaucratic style and clarified to give it focus. If a site is eligible for closure, there does not appear to be any reason to additionally state that closure will be "granted." Both "institutional control option" and "any other appropriate tool" are so vague as to be essentially meaningless.

l. The authority for a site does not "fall" under an agency's jurisdiction as provided under s. Comm 46.03 (2). That authority is defined by ss. Comm 46.02 (5) to (7) and 46.03 (1). This sentence should commence: "The authority of DNR and Commerce for a site includes . . . ."

m. The agencies should be able to determine the scope of their authority for the various types of sites. This authority should be described specifically, if it is to be described at all, in s. Comm 46.03 (2), rather than using the catchall phrase "but is not limited to . . . ."

n. The authority described under s. Comm 46.03 (2) includes "enforcement." Can the rule be more specific in describing what elements of statute or rule are to be enforced by the agencies?

o. "Decision making" should be hyphenated in s. Comm 46.03 (2) and other places in the rule.

p. The definitions of "Commerce" and "DNR" include "department." It is therefore unnecessary to refer to the ***departments*** of Commerce and DNR in s. Comm 46.03 (3) (intro.).

q. The agencies are declared to have separate authority under s. Comm 46.03 (1) but joint responsibilities under s. Comm 46.03 (3) and several other provisions in the rule. The rule fails to specify clearly what it means for either agency to "have authority" for a site but also to have joint responsibilities for all sites.

r. Section Comm 46.03 (3) (b) is unclear. Does this provision mean that sites which are not competitively bid or bundled will not have remediation targets or does this mean that the setting of remediation targets for sites that are not competitively bid or bundled is the separate responsibility of each agency? If the latter is correct, should the setting of remediation targets be added to the authority listed under s. Comm 46.03 (2)?

s. The phrase "shall be conducted in a manner designed to meet" in s. Comm 46.04 (1) should be replaced by "shall comply with." Also, this subsection, like many provisions in the proposed rule, uses the passive voice, and the rule does not indicate who has the responsibility to comply with ch. NR 716.

t. Having defined "Commerce" and "DNR," the rule should use those terms rather than "the departments" in s. Comm 46.04 (2) and other places in the rule.

u. The intent of s. Comm 46.04 (2) could be substantially clarified. Is the requirement to develop this methodology a separate or joint responsibility of the agencies? What does it mean for the methodology to be "agreed upon"? Who agrees and how will this agreement be reached? Is it the intent that this methodology, when it is developed, will be incorporated into the rule? The methodology is to determine if there is evidence of "an expanding plume" but the presence of an expanding plume is only one of several risk factors in s. Comm 46.05.

v. The comment in the previous paragraph of this report regarding s. Comm 46.04 (2) and the joint or separate development of the methodology also applies to the "agreed upon" risk protocol discussed in s. Comm 46.05. Section Comm 46.05 could also benefit substantially from further clarification. The risk assessment relates to "safety and health" risks. Are these ***public*** safety and health risks? The phrase "action level" is used in this section, but there is no indication of what is meant by this term. The list in the first sentence of the introduction requires "measures to address environmental risk factors," but fails to mention safety and health risks that are referred to earlier in the same sentence.

w. It is not clear how the environmental risk factors listed in the second sentence of s. Comm 46.05 (intro.) relate to the decision to close sites under s. Comm 46.05 (1). (Note that the numbering of the subsections in s. Comm 46.05 is incorrect.)

x. It is not clear how the "joint setting of remediation target levels" under s. Comm 46.05 (2) is to be done, and how this process will relate to s. Comm 46.03 (1), which divides the authority of the agencies for high, medium and low priority sites.

y. It is not clear what is meant by determining the extent to which the "protocol" applies during site investigation in s. Comm 46.05 (3). The introductory paragraph of s. Comm 46.05 describes a "protocol" that measures risks. There is no other indication that this "protocol" ***does not***

apply during the site investigation, so it is unclear why it must be determined under s. Comm 46.05 (3) the extent to which the "protocol" applies during site investigation.

z. What is the relationship between a "site closure" decision and a "no further action" decision in s. Comm 46.06 (1) (intro.)? Are procedures for each of these decisions established elsewhere? If so, can that procedure be referenced in the rule?

aa. How does the risk assessment established under s. Comm 46.05 relate to site closure decisions under s. Comm 46.06 (1)? For example, s. Comm 46.06 (1) (a) ***requires*** closure of certain sites, depending on the level of contamination, without any other consideration of risk factors.

ab. Section Comm 46.06 (1) (b) and (c) require "sites" to have "a remediation target." Does this mean that competitively hid or bundled sites will have a single remediation target? Also, will joint decisions on remediation targets always be required, e.g., if all sites in a "bundle" are high priority sites?

ac. Section Comm 46.06 (2) establishes standards for "joint closure decisions." These decisions apply to sites with groundwater contamination at or above the enforcement standard. Is there any reason why the defined term "high priority site" is not used to describe these sites? Who prepares the site closure request under par. (a)? Also, par. (a) refers to the "appropriate fee." What are the fees for this request? In par. (b), the rule does not indicate how DNR determines whether institutional controls are to be imposed or how DNR decisions relate to remediation targets.

ad. Section Comm 46.06 (2) (d) and (e) describe a process in which Commerce can request DNR to solicit a closure request from the site owner and a process for dispute resolution. These provisions cannot accurately be described as a "joint closure decision," as in the subsection title. Also, it is not clear why s. Comm 46.05 (2) allows for the joint setting of remediation target levels for sites that cannot be closed at the end of the investigation stage, but a process must be included in s. Comm 46.06 (2) (d) if Commerce believes that a site has met the remediation target. Does the process in s. Comm 46.06 (2) (d) relate to uncertainty about whether the remediation target jointly set by the agencies has been met, or is this a method for Commerce to request a different remediation target from the one that was jointly set? Finally, in par. (d), the phrase "they believe" should be replaced by the phrase "it believes" and the word "they" should be replaced by the word "it."

ae. Section Comm 46.06 (2) (e) refers to disputes between the agencies "as to whether a site qualifies for closure under [par.] (d)." However, par. (d) merely creates a process for Commerce to request DNR action, and does not establish a process for determining whether a site qualifies for closure.

af. A procedure for electronic tracking of remediation progress is required by s. Comm 46.06 (4). This electronic tracking is required to determine if remediation targets are achieved. However, the definition of "remediation target" relates only to sites which have contamination levels that provide eligibility for closure using institutional controls. Are there sites for which closure is available and institutional controls are not required? If so, should these also be included in the electronic tracking system? Also, "DNR and Commerce" should be substituted for "the departments" in s. Comm 46.06 (4) (a) and (b). Is the achievement of remediation targets to be the only purpose for the electronic tracking system? Will the electronic tracking system be applied only

to new claims or will it also be required for claims that are in progress? It appears sufficient to state, as provided in s. Comm 46.06 (4) (b), that DNR and Commerce will require the use of the reporting system by claimants. It is not clear why the rule must also state that use of the reporting systems will be enforced: all mandatory provisions of the rule are enforced.

ag. Is it intended that DNR requests additional information ***from the applicant*** under s. Comm 46.07 (1) (a)?

ah. What is the "enforcement action" referred to in s. Comm 46.07 (1) (b)? What is the consequence of an enforcement action initiated by DNR? Section Comm 46.07 (1) (intro.) and (b) require DNR to determine which agency has authority for the site ***unless*** the site is subject of an enforcement action. Does this mean that neither agency has authority for the site or that DNR has authority for the site if it has commenced an enforcement action?

ai. The phrase "they believe has jurisdiction" in s. Comm 46.07 (2) should be replaced by "they believe has authority under s. Comm 46.03 (1)."

aj. Section Comm 46.07 (3) should be rewritten. Obviously, an agency will not "transfer the site." Presumably, this means that the correct agency will be assigned ***authority*** for the site. Also, this provision requires "all related data" to be transferred between agencies.

ak. Section Comm 46.07 (4) refers to "target levels" and it is not clear how this relates to "remediation targets."